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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DESILVA GATES CONSTRUCTION, L.P., Cross-complainant and Appellant, v. M. BUMGARNER, INC., Cross-defendant and Respondent.	A122576 (Alameda County Super. Ct. Nos. VG-03-134125, VG-03-122358, VG-04-140656)

INTRODUCTION

DeSilva Gates Construction, L.P. (DeSilva Gates) appeals from a determination of the Alameda County Superior Court, following a jury trial, that subcontractor M. Bumgarner, Inc. (MBI) owed DeSilva Gates neither a duty to defend nor a duty to indemnify under the terms of the subcontract between the two. DeSilva Gates and others had been sued by Ramona Schlicker and other plaintiffs for personal injuries and other damages plaintiffs had sustained in two separate automobile accidents occurring in February 2003 on Interstate 580. The central question presented here is whether the trial court properly allowed the jury to determine whether the plaintiffs' claims "arose out of or in connection with MBI's operations performed under the subcontract."

DeSilva Gates contends the trial court erred in submitting the question to the jury and in refusing to rule on the issue as a question of law based solely on the plaintiffs' pleadings and the language of the subcontract. DeSilva Gates further contends that the

court erred in denying its motions for judgment on the pleadings and for judgment notwithstanding the verdict (JNOV), as the evidence supported a verdict in its favor as a matter of law, and in denying its motion in limine to exclude causation evidence as improper and prejudicial. Finally, DeSilva Gates argues that the jury instructions and special verdict form were incomplete, misleading, and improperly deferred the interpretation of the contract to the jury. We shall conclude the court erred in submitting to the jury the question whether the plaintiffs' claims "arose out of or in connection with MBI's operations" under the subcontract as to MBI's duty to defend, but did not err in submitting that question to the jury as to the indemnity issue.

FACTS AND PROCEDURAL BACKGROUND

The City of Dublin contracted with DeSilva Gates to be the general contractor on a highway overcrossing improvement project on Interstate 580 in the area just east of the Santa Rita Road and Tassajara Road overcrossing. DeSilva Gates contracted to erect a new overpass and ramps to handle the increased traffic flow associated with development of areas around Dublin.

The Work

On May 16, 2002, DeSilva Gates subcontracted to MBI performance of overhead sign and metal beam guard rail work, as well as work related to a cable median barrier located in the highway median between the eastbound and westbound lanes of Interstate 580.[1] MBI contracted to detach 25 meters of cable median barrier adjacent to the Tassajara overcrossing to allow another subcontractor access to the median and to then reattach the same portion of cable median barrier.[2] On May 22, 2002, MBI

[1] Pursuant to exhibit "A" of the subcontract, MBI's work included the removal of the cable barrier (item #30) and metal beam guard railing (item #31); reconstruction of the cable barrier (item #45) and metal beam guard railing (item #46); and work on the terminal system (item #143) and the terminal anchor assemblies (items #144-145).

[2] DeSilva Gates maintains, and MBI does not dispute, that MBI was the only subcontractor retained by DeSilva Gates to perform work on the cable median barrier and DeSilva Gates subcontracted out to MBI all of the work related to the cable barrier system.

employees detached the 17 meters (55.77 feet) of cable median barrier east of the Tassajara overcrossing and eight meters to the west of the overcrossing and removed the anchor, as called for in the project plans. Sometime shortly after that date, another of DeSilva Gates's subcontractors removed an additional 29.34 meters (96.26 feet) of cable median barrier. When MBI returned on November 26, 2002 to reconstruct the median's cable barrier, it had contracted to reconstruct the additional 29.34 meters removed, for a total reconstruction by MBI of 54.34 meters (178.28 feet) of cable median barrier—46.34 meters (152.03 feet) of which was located east of the Tassajara overcrossing. MBI's work on the cable median barrier ended roughly 152 feet east of the Tassajara overcrossing (nearly one-half mile from the location of the accidents) and was completed by November 27, 2002, more than two and one-half months before the first automobile accident.

The Accidents

On February 16, 2003, German Rodriguez was traveling westbound on Interstate 580 when his pickup truck struck the cable median barrier separating eastbound and westbound traffic on Interstate 580, passed through the highway median's cable barrier system, and collided with two vehicles in the opposing lanes of traffic. Rodriguez first struck a vehicle driven by Fernando Silveira, and containing passengers Tammy, Adryanna, Alexandria, and Taylor Silveira (the *Silveira* plaintiffs). The Silveira plaintiffs all claimed to have been injured in this accident. Rodriguez then collided with a second vehicle driven by Ramona Schlicker, in which Laci Schlicker was a passenger. Ramona and Laci Schlicker claimed injuries as a result of the accident, and Hans Schlicker claimed loss of consortium damages (the *Schlicker* plaintiffs). This accident occurred approximately 2,331 feet east of the Tassajara overcrossing.

Nine days later, on February 25, 2003, an automobile driven by Evert Alberto[3] in the general vicinity of the previous accident, struck and again passed through the cable

[3] DeSilva Gates identifies the driver of the car crossing the cable median barrier as "Alberta Gonzales." MBI and the complaint filed in the *Festejo* action identifies that driver as "Evert Alberto."

median barrier separating the Interstate 580 lanes of travel east of Tassajara Road, colliding with the oncoming vehicle driven by Milagros Festejo. Both drivers were killed in this collision. The accident occurred approximately 2,379 feet east of the Tassajara overcrossing, nearly 50 feet east of the previous accident.

These two accidents resulted in three lawsuits being filed against, among others, numerous entities involved in the construction project, including the City of Dublin, the State of California, and Caltrans, as well as against appellant general contractor DeSilva Gates. In addition to other claims, all contained allegations regarding the condition of the cable median barrier system.

The Silveira Plaintiffs' Complaint

On February 10, 2004, the *Silveira* plaintiffs sued Rodriguez, his employer, Caltrans, and the State of California. With respect to the median barrier, the complaint alleged that "Interstate 580 in and about the location of the collision was in a dangerous condition in that there was an unsafe and insufficient median barrier. The cable barrier was also in a state of disrepair, in need of replacement, and not properly maintained, resulting in irregular elevation which further reduced arrest potential of the cable barrier. The cable barrier was also defectively designed. This unsafe condition allowed the vehicle operated by Defendant Rodriguez to cross over the median divider . . . ." In an amended complaint filed on May 13, 2004, the *Silveira* plaintiffs alleged in addition to the foregoing with respect to the cable median barrier: "At all relevant times, said highway was in a dangerous condition, including but not limited to the following:

"(a) The median barrier separating the eastbound and westbound lanes of traffic was an obsolete cable type barrier with uneven elevations due to age and/or poor maintenance, and with little or no potential to stop a high speed vehicle from crossing over the median and striking on-coming traffic.

"(b) Given the narrow width of the median, the volume and speed of traffic on the highway, the age and condition of the cable barrier, and defendants' own recognition that the cable barrier system was inadequate, obsolete and should be replaced, the cable

barrier provided no adequate protection even to careful motorists against cross-median accidents.

"(c) After the original design and construction of the highway in question, the surrounding conditions were changed, rendering the highway unsafe to motorists using due care. These changed conditions included, but are not limited to: the planting of oleanders in the median, creating the potential for vehicles to 'ramp' over or through the cable barrier and enter on-coming traffic; poor maintenance of the aging cable barrier system, such that its arrest potential was diminished or eliminated . . . ."

The *Silveira* plaintiffs added DeSilva as a Doe defendant on October 7, 2004.

The Schlicker Plaintiffs' Complaint

The *Schlicker* plaintiffs filed a similar action against Rodriguez, his employer, the State of California and Caltrans. The original and amended complaints filed by the *Schlicker* plaintiffs contained allegations identical to those in the original *Silveira* plaintiffs' complaint regarding the cable median barrier. On May 5, 2004, the *Schlicker* plaintiffs amended their complaint to add DeSilva as a Doe defendant.

The Festejo Plaintiffs' Complaint

As a result of the second accident involving Milagros Festejo, her husband and daughter, Adelmo and Stephanie Festejo (the *Festejo* plaintiffs), filed a wrongful death action against the State of California. On November 22, 2004, the complaint was amended to add DeSilva Gates as a defendant. As had the *Silveira* and *Schlicker* complaints, the *Festejo* complaint alleged, with respect to the median barrier, that "Interstate 580 in and about the location of the collision was in a dangerous condition in that there was an unsafe and insufficient median barrier. The cable barrier was also in a state of disrepair, in need of replacement, and not properly maintained, resulting in irregular elevation which further reduced arrest potential of the cable barrier." It continued, "defendant DeSilva Gates . . . was performing construction at the location where the accident giving rise to this action occurred pursuant to a contract with the City of Dublin. DeSilva Gates was negligent in its maintenance of the construction zone, including the cable barrier medians, within which Evert Alberto was operating his vehicle

and Milagros Coronado Festejo was killed. DeSilva Gates was also negligent in the design and construction of the work being performed at and around the accident scene. De Silva Gates['s] negligence was a substantial factor in the accident giving rise to this action and plaintiffs' injuries and damages that flowed therefrom."

The Subcontract Indemnity Provisions

Upon receipt of the plaintiffs' complaints, DeSilva Gates tendered its defense of these claims to MBI. MBI refused to accept the tender of defense and DeSilva Gates cross-complained against MBI, seeking indemnity in the *Festejo*, *Silveira* and *Schlicker* actions under the indemnity provisions of its subcontract with MBI. The subcontract provided in relevant part as follows:

"SECTION 15. <u>INDEMNIFICATION</u>

"15.1.1 <u>Subcontractor's Performance.</u> With the exception that this section shall in no event be construed to require indemnification by Subcontractor to a greater extent than permitted under the public policy of the State of California, Subcontractor shall indemnify and save harmless Owner and Contractor, including their officers, agents, employees, affiliates, parents and subsidiaries, and their successors and assigns, and each of them, of and from any and all claims, demands, causes of action, damages, costs, expenses, losses or liability in law or in equity, of every kind and nature whatsoever **('Claims')** ***arising out of or in connection with Subcontractor's operations to be performed under this Agreement, including but not limited to*** [italics and bolding added.]:

"(a) Personal injury including, but not limited to, bodily injury, emotional injury, sickness or disease, or death to persons . . . and/or damage to property of anyone (including loss of use thereof) *caused or alleged to be caused in whole or in part by any negligent act or omission of Subcontractor* or anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable, regardless of whether such personal injury or damage is caused by a party indemnified hereunder. [Italics added.]

"[¶] . . . [¶]

"The indemnification provisions set forth above shall extend to Claims occurring after this Agreement is terminated as well as while it is in force. Such indemnity provisions apply regardless of any active and/or passive negligent act or omission of Owner or Contractor or their agents or employees. Subcontractor, however, shall not be obligated under this agreement to indemnify Owner or Contractor for Claims arising from the sole negligence or willful misconduct of Owner or Contractor or their agents, employees or independent contractors who are directly responsible to Owner or Contractor.

"15.1.2 Subcontractor shall:

"(a) At Subcontractor's own cost, expense, and risk, *defend all Claims as defined above that may be brought or instituted by third persons*, including, but not limited to, governmental agencies or employees of subcontractor, *against Contractor* or Owner or their agents or employees or any of them [italics added];

"(b) Pay and satisfy any judgment or decree that may be rendered against Contractor or Owner or their agents or employees, or any of them, arising out of any such Claim; and/or

"(c) Reimburse Contractor or Owner or their agents or employees for any and all costs and expenses incurred by any of them in connection herewith or in enforcing the indemnity granted in this section."

The Litigation

During the course of the litigation, MBI and De Silva Gates each moved for summary judgment, supported by various declarations and other evidence. MBI contended as a matter of undisputed material fact that its work on the cable median barrier was limited and could not have affected the cable barrier at the points of the accidents, nearly one-half mile away. The trial court denied that motion. The court also denied DeSilva Gates's motion for summary judgment on procedural grounds and did not reach the merits.

DeSilva Gates participated in global settlements of all three actions with all of the parties to the lawsuits, except MBI.[4] The three cases were then consolidated as to DeSilva's cross-complaints against MBI for indemnity.

On April 1, 2008, DeSilva Gates filed it's "Trial Brief and Request for Determination as a Matter of Law," wherein it argued that the allegations of the complaints were sufficient to trigger the express indemnity obligation of the subcontract and that the only issue to be determined by the court was the amount of damages to which DeSilva Gates was entitled. On April 7, 2008, following argument, the trial court denied DeSilva Gates's request for judgment as a matter of law, and ruled that whether or not the indemnity provision had been triggered involved questions of fact.

The court reserved ruling upon DeSilva Gates's motion in limine No. 6 seeking to exclude any reference or introduction of evidence related to accident causation. The court indicated that it needed to hear more evidence before ruling on the motion.

The indemnity action proceeded to trial before a jury on April 15, 2008, and the jury ultimately determined in a unanimous special verdict that the claims of the plaintiffs in the three underlying lawsuits did not "arise out of or in connection with the work performed by MBI." On May 13, 2008, the court entered judgment on the verdict. On May 28, 2008, DeSilva Gates moved for JNOV on the grounds that the evidence submitted at trial supported a finding that the indemnity provision was triggered as a matter of law. The court heard and denied DeSilva's JNOV motion and its accompanying motion for new trial.

This timely appeal followed.

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[4] The State of California paid $3.4 million to settle the *Schlicker* action. It settled the *Festejo* action for an immediate cash payment of $550,000, lifetime monthly payments to Stephanie Festejo in the amount of $3,345.01 guaranteed for 50 years, and lifetime monthly payments to Adelmo Festejo in the amount of $4,400 guaranteed for 20 years. It appears DeSilva Gates paid $350,000 in settlement of *Festejo*, $325,000 in *Schlicker*, and $4,285.72 in *Silveira*. It also sought legal fees and costs in *Schlicker* and *Silveira* of $434,288 and in *Festejo* of $192,046. Counsel for DeSilva Gates stated in argument that MBI had stipulated to the reasonableness of the settlements.

DISCUSSION

I. Duties to Indemnify and to Defend

The Law

In *Crawford v. Weather Shield Mfg, Inc.*. (2008) 44 Cal.4th 541 (*Crawford*), the California Supreme Court described at length the general principles concerning indemnity in the noninsurance context:

"Parties to a contract, including a construction contract, may define therein their duties toward one another in the event of a third party claim against one or both arising out of their relationship. Terms of this kind may require one party to *indemnify* the other, under specified circumstances, for moneys paid or expenses incurred by the latter as a result of such claims. (See Civ. Code, § 2772 ['Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.'].)[5] They may also assign one party, pursuant to the contract's language, responsibility for the other's *legal defense* when a third party claim is made against the latter. [Citation.]

"As befits the contractual nature of such arrangements, but subject to public policy and established rules of contract interpretation, the parties have great freedom to allocate such responsibilities as they see fit. [Citations.] 'When the parties knowingly bargain for the protection at issue, the protection should be afforded.' [Citations.] Hence, they may agree that the promisor's indemnity and/or defense obligations will apply only if the promisor was negligent, or, conversely, even if the promisor was not negligent. [Citations.]

"In general, such an agreement is construed under the same rules as govern the interpretation of other contracts. Effect is to be given to the parties' mutual intent (§ 1636), as ascertained from the contract's language if it is clear and explicit (§ 1638).

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[5] "All further unlabeled statutory references are to the Civil Code." (*Crawford, supra,* 44 Cal.4th at p. 551, fn. 5.)

Unless the parties have indicated a special meaning, the contract's words are to be understood in their ordinary and popular sense. (§ 1644; [citations].)

"Though indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly. Ambiguities in a policy of insurance are construed against the insurer, who generally drafted the policy, and who has received premiums to provide the agreed protection. [Citations]. In noninsurance contexts, however, it is the *indemnitee* who may often have the superior bargaining power, and who may use this power unfairly to shift to another a disproportionate share of the financial consequences of its own legal fault. [Citations.]

"This public policy concern influences to some degree the manner in which noninsurance indemnity agreements are construed. For example, it has been said that if one seeks, in a noninsurance agreement, to be indemnified for his or her own active negligence, or regardless of the indemnitor's fault—protections beyond those afforded by the doctrines of implied or equitable indemnity—language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee. [Citations.]

"For similar public policy reasons, statutory law imposes some absolute limits on the enforceability of noninsurance indemnity agreements in the construction industry. At the time [DeSilva Gates] contracted with [MBI], a party to a construction contract could not validly agree to indemnify the promisee for the latter's *sole* negligence or willful misconduct. (§ 2782, subd. (a); see also § 1668.)

"Finally, section 2778, unchanged since 1872, sets forth general rules for the interpretation of indemnity contracts, 'unless a contrary intention appears.'[6] If not

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[6] Section 2778 provides: "In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

"1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable;

"2. Upon an indemnity against claims or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof;

forbidden by other, more specific statutes, the obligations set forth in section 2778 thus are deemed included in every indemnity agreement unless the parties indicate otherwise. . . ." (*Crawford, supra,* 44 Cal.4th at pp. 551-553.)

Crawford addressed duty to defend issues in a noninsurance context, much like the instant case. The court held that where the underlying suits *alleged* a claim that would be covered by the subcontract (in that case, allegations of construction defects arising from the subcontractor's negligence), the indemnitor's duty to defend arose when the underlying action was brought, even though (1) a jury ultimately found the subcontractor was not negligent, and (2) the parties accepted an interpretation of the subcontractor that gave the builder no right of *indemnity* unless the subcontractor was negligent. (*Crawford, supra*, 44 Cal.4th at p. 547.)

DeSilva Gates here maintains that *Crawford, supra,* 44 Cal.4th 541, which was decided after the judgment in this case, is dispositive of the issues presented here. The clause at issue in *Crawford* obligated the subcontractor "to defend [the developer] against any suit 'founded upon' a 'claim of . . . damage' 'growing out of the execution of [the subcontractor's] work.' " (*Id.* at p. 563.) We agree that this clause is for all intents and purposes the same as the defense clause operative here, obligating MBI to defend all

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"3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion;

"4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so;

"5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against the former;

"6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former;

"7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits, which by want of ordinary care he failed to establish in the action."

claims brought by third parties against DeSilva Gates, "arising out of or in connection with" MBI's operations under their subcontract. Nevertheless, *Crawford* is distinguishable, as the question at the heart of this appeal was not in dispute in *Crawford*: whether, as a matter of law, the plaintiffs alleged claims "[arose] out of or in connection with" MBI's work under the subcontract. In *Crawford*, the indemnitor Weather Shield was the direct supplier of the wood-framed windows installed by the indemnitee developer; windows that the homeowners alleged had leaked and fogged, causing extensive damage. (*Id.* at p. 548.) There was no dispute that the homeowners' lawsuits were "founded upon" claims of damage growing out of the execution of Weather Shield's work. The focus of the court's analysis was whether the contract, in which the duty to indemnify was tied to the subcontractor's *negligence*, required the subcontractor to provide a defense to a suit against the developer even if the subcontractor was not negligent. (See *id.* at p. 560.) *Crawford* held that "Weather Shield's express contractual duty to defend suits 'founded upon' the kinds of claims specified in the agreement necessarily extended to suits that *alleged* such claims, not just suits in which they were proven." (*Id.* at p. 560.)

The trial court in the case before us ruled, over MBI's objection, that MBI's negligence or lack thereof was irrelevant to the question whether the plaintiffs' claims "[arose] out of or in connection with the work performed by MBI." The court here determined this question required the presentation of evidence on the closeness of the connection between the work performed by MBI and the plaintiffs' claims regarding the accidents.[7] The court further determined resolution in the circumstances was a question

[7] The court explained its thinking on this issue in ruling on motion in limine No. 6: "Let me at least express to you what I believe to be the issue that's going to have to be resolved and it doesn't mean that I'm right. I'm just telling you what my understanding is and you all can help me understand the error of my ways, if it comes down to that.

"I do not view the fact, the situation to be one where plaintiff has to prove the defendant played a part in the accident and in any way related to it. [¶] What plaintiff, it seems to me, is going to have to prove in this case is that defendant's company worked on this part of it and that their work on that part of it had a role in the accident. In other words, let's make the point by the absurd. [¶] If this were a 200-mile-long project and at

of fact appropriate for a jury determination. We are persuaded here that the court and the parties conflated the duty to defend and the duty to indemnify. While the court properly submitted the "arising out of" question to the jury with regard to MBI's duty to indemnify DeSilva Gates, it erred in submitting the question as to the broader duty of MBI to defend DeSilva Gates from claims embraced in the indemnity.

We start with the words of the indemnity contract. (See *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 504 (*Continental Heller*) [" 'In interpreting an express indemnity agreement, the courts look first to the words of the contract to determine the intended scope of the indemnity agreement.' [Citation.]"].)

The subcontract between these parties requires MBI to indemnify DeSilva Gates "of and from any and all claims, demands, causes of action, damages, . . . of every kind and nature whatsoever ('Claims') *arising out of or in connection with Subcontractor's operations to be performed under this Agreement, including but not limited to:* [¶] (a) Personal injury. . . and/or damage to property . . . *caused or alleged to be caused in whole or in part by any negligent act or omission of Subcontractor* . . . ." (Italics added.)

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mile two, the accident happened and at mile 198 the company had, you know, the defendant had worked on the project. It doesn't seem to me it's likely to say there's some liability there because there's no cause and effect, if you will. [¶] Now somewhere between mile two and mile 198, they get close enough that there's a causational factor involved in it."

"[Attorney for DeSilva Gates]: Right.

"THE COURT: And that's what the battle it seems to me is going to be over is the causational factor, in other words, was 2,000 yards, 200 yards, I don't know, whatever it was, two something yards down the road was that close enough to be a causational factor that required indemnity or was it so far removed and so remote in that there's just no factual basis for indemnity."

"[¶] . . .[¶]

"THE COURT: . . . There's got to be some factual connection between the two to bring in the claim, the express indemnity. Just the fact the parties have a contract together doesn't create a factual situation that gives rise to the indemnity claim. You have to at least establish some facts that connect the two."

The indemnity provisions of the subcontract also require MBI to "*defend all Claims as defined above that may be brought or instituted by third persons . . . against Contractor* or Owner or their agents or employees or any of them." (Italics added.) Consequently, the subcontract required MBI "to indemnify" De Silva Gates from and to "defend" DeSilva Gates against "all Claims" "arising out of or in connection with [MBI's] operations to be performed under [the] Agreement . . . including but not limited to . . . [p]ersonal injury . . . and/or damage to property . . . caused or alleged to be caused . . . by any negligent act or omission of [MBI] . . . ."

Duty to Indemnify

Indemnity agreements commonly contain language providing for indemnification in cases of loss " 'arising out of or in any way connected with' " the performance of the contract. (*Continental Heller, supra,* 53 Cal.App.4th at pp. 506-507 & fn. 3.) *Continental Heller* recognized, however, that only a few cases "address the meaning of 'arising out of performance of work,' or its equivalent, in terms of *causation*," rather than whether the language expresses an intent to indemnify the indemnitee for its own negligence. (*Id.* at pp. 506-507, fn.3, italics added.) Those few cases read the language as requiring a connection similar to that for determining cause in fact, at minimum a "but for" causation test. (*Id.* at pp. 506-507, fn. 3.) This appears to mirror the interpretation of the phrase in the insurance context, where liability " 'arising out of' the insured's work connotes only a 'minimal causal connection or incidental relationship.' " (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶ 7:1409.2, quoting *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, 328.) Hence, something *less* than proximate cause may be required. Cases considering the question have made clear that some minimal connection between the claims and the indemnitor's performance is required. (See *Fireboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 503-504.)

Such a minimal causal connection was required by the appellate court in *Continental Heller, supra,* 53 Cal.App.4th at pages 505-507. In that case, the subcontractor Amtech installed a refrigeration system in an expanded meat packing plant

owned by Oscar Meyer. Years later, an explosion was caused by the failure of a valve installed by Amtech. In an action by the general contractor for indemnity for its settlement of underlying claims, the appellate court concluded that an indemnity agreement requiring Amtech to indemnify Continental Heller for work " 'which arises out of or is in any way connected' with the subcontractor's 'acts or omissions' in the performance of its work [did] not require a showing the subcontractor was at fault in causing the general contractor's loss or that its performance was a 'substantial' or 'predominating' cause of the loss." (*Id.* at p. 503.) It did, however, require some proof of causation. (*Id.* at p. 505, fn. 1.)[8]

In *Centex Golden Construction Co. v. Dale Tile Co.* (2000) 78 Cal.App.4th 992 (*Centex*), tile subcontractor Dale promised to indemnify Centex, the contractor, " 'from and against . . . [a]ny claim, liability, loss, damage . . . resulting from Contractor's alleged or actual negligent act or omission . . . ' " " 'with respect to all work which is covered by or incidental to this subcontract.' " (*Id.* at pp. 995, 997.) The *Centex* court relied upon *Continental Heller* to hold the subcontractor could be liable without fault (*Centex*, at pp. 995, 997-998), but recognized that some causal connection between the underlying claim and the work was required. (*Id.* at p. 999.)[9] "Because under the terms

[8] Because the language of the contract required Amtech's liability be connected to an "act" or "omission" in the performance of the subcontract, and not merely to the performance itself, the court required something *more* than "but for" causation. It explained, "the fact Amtech installed the refrigeration system in the plant would not make it liable for indemnity for the loss incurred in paying damages to someone who suffered food poisoning from eating an Oscar Meyer hot dog on the theory that but for the refrigeration system Oscar Meyer could not have made the hot dog. The indemnitee in this hypothetical case would have to establish the loss was in some way connected to a specific act or omission of Amtech. Amtech is not liable for *any* act or omission connected with the performance of work under the subcontract, but only acts or omissions 'on the part of [Amtech], its agents, subcontractors or employees.' " (*Id.* at p. 507.)

[9] "Under the contract as we have interpreted it, [Centex] was only required to show that the claim was connected to Dale's work, and that it did not grow out of [Centex's] sole negligence or willful misconduct. [¶] There has never been any dispute

of the agreement indemnity only arises with respect to work covered by the contract, there must be some connection between the subcontractor's work and the claim. For instance, Dale would not be required to indemnify [Centex] simply because a plaintiff was standing on tile Dale had laid when another part of the building fell on the plaintiff. (Cf. *Continental Heller, supra,* 53 Cal.App.4th at p. 507 [indemnity provision valid where no indemnity without some 'act' or 'omission' by subcontractor].) Thus the contractor did not require Dale to assume unlimited liability to [Centex] for all the work done by [Centex] and the other subcontractors. (*Ibid.*) Indeed, in addition to the requirement that any claim arise out of the subcontractor's work, as required by Civil Code section 2782, the agreement expressly relieved Dale of liability where the claim or loss arises out of the sole negligence or willful misconduct of [Centex] or its other subcontractors." (*Centex,* at p. 999.)

Similarly here, MBI's obligation to indemnify DeSilva Gates required a showing that the underlying claim arose out of MBI's performance of the subcontract.[10] This

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that the owner made a claim with respect to Dale's tile work . . . ." (*Centex, supra,* 78 Cal.App.4th at p. 1000.)

[10] It is at least arguable that the contract language also premises MBI's duty to indemnify upon some showing of negligence, given the reference in subdivision (a) of the indemnity provision to personal injury or death "caused or alleged to be caused in whole or in part by any negligent act or omission of [MBI] or anyone . . . for whose acts [MBI] may be liable . . . ." As recognized in *Centex* and in *Continental Heller,* the allocation of risk absent fault to an indemnitor "requires some expression in the agreement which indicates that 'the *indemnitor's* conduct or fault is of no consequence in determining whether the indemnity obligation is triggered.' [Citation.]" (*Centex, supra,* 78 Cal.App.4th at p. 998; *Continental Heller, supra,* 53 Cal.App.4th at p. 505.) As the Supreme Court observed in *Crawford,* "if one seeks, in a noninsurance agreement, to be indemnified for his or her own active negligence, or *regardless of the indemnitor's fault*—protections beyond those afforded by the doctrines of implied or equitable indemnity—language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee. [Citations.]" (*Crawford, supra,* 44 Cal.4th at p. 552, italics added.) We need not determine whether the language in the subcontract at issue here was sufficiently clear and explicit that MBI was obliged to indemnify DeSilva Gates in the absence of a showing of some negligence on the part of MBI to trigger the indemnity obligation, as MBI has not raised this issue on appeal and because we

minimal causation determination involved resolution of numerous questions of fact. These questions concerned MBI's work on the cable median barrier, the way in which cable median barriers operate, whether work on a barrier could possibly impact the cable median barrier some distance away, and the causes of the accidents. Proximate cause was not the issue. MBI asserted that *nothing it did or failed to do* under its subcontract *had any connection whatsoever* with either accident. Essentially, it maintained that there was *not even a minimal "but for" connection* between its work on the cable median barrier and the accidents occurring about a half mile away. Whether the accidents "arose out of or in connection with" MBI's work under the subcontract was properly submitted to the jury in these circumstances.

Duty to Defend

We turn to the question whether MBI breached its duty to defend DeSilva Gates in the underlying action. Although the language of the duty to defend clause references the definition of the duty to indemnify clause, the scope and the timing of the two duties are not the same. Unlike the duty to indemnify that arises upon proof that the indemnity is actually owed—in this case, proof the plaintiffs' claims "[arose] out of or in connection with" MBI's operations under the contract[11]—the duty to defend arises upon proper tender of a defense by the indemnitee of a claim *alleging* facts that would give rise to a duty to indemnify. (See *Crawford, supra*, 44 Cal.4th at pp. 558-559.) As *Crawford* explained, the duty "to defend" set forth in the subcontract "clearly contemplated a duty that arose when such a claim was made, and was not dependent on whether the very litigation to be defended later established [MBI's] obligation to pay indemnity." (*Crawford, supra,* 44 Cal.4th at p. 558, fn. omitted.) As we have said, the actual imposition of the duty to indemnify in this case required inquiry into and resolution of

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conclude the jury was properly asked to determine the causation-related question and its determination was supported by substantial evidence.

[11] "[A] clause requiring [the indemnitor] to indemnify [the indemnitee] 'against' defined claims clearly indicated that the indemnity obligation would apply only if [the indemnitee] ultimately incurred such a legal consequence *as a result of covered claims*." (*Crawford, supra,* 44 Cal.4th at p. 559, italics added.)

disputed facts. In contrast, the determination that MBI had a duty to defend DeSilva Gates was a question of law for the trial court, based upon the interpretation of the subcontract between the parties and the allegations (broadly construed) of the complaints. No parol evidence was introduced as to the parties' understanding of the meaning of the subcontract when they entered into it. Hence, its interpretation was a matter of law for the trial court.

The question of whether the complaints here alleged damages or loss "arising from or connected with" MBI's operations under the subcontract, seems to us in this case quintessentially a question of law to be resolved by the court. *Crawford* recognized that the trial court may wait until trial of the underlying case to "assess *after the fact*" the indemnitor's proportionate liability for breach of its duty to defend where the litigation poses "practical difficulties of sorting out multiple, and potentially conflicting, duties to assume the active defense of litigation then in progress." (*Crawford, supra,* 44 Cal.4th at p. 565, fn. 12.)[12] Such practical problems are not present here where only the DeSilva Gates cross-complaint against MBI remained, and the single issue was whether the plaintiffs' claims arose out of MBI's work under the subcontract. Moreover, the Supreme Court in *Crawford* did not indicate that the determination of the duty to defend question was one for the jury. (*Crawford*, *supra*, 44 Cal.4th at p. 565, fn. 12.) It explained that, upon summary adjudication, "the court may resolve legal issues then ripe for adjudication, such as whether the contracts at issue include a duty to defend, and, if

[12] "When a party sues one or more other persons, seeking to establish a contractual right to a defense against litigation not yet concluded, these issues may, if the parties agree, be deferred until the underlying litigation is complete. If any party moves for summary judgment or adjudication (Code Civ. Proc., § 437c) with respect to the duty to defend against litigation still in progress, the court may proceed as it deems expedient. For example, the court may resolve legal issues then ripe for adjudication, such as whether any of the contracts at issue include a duty to defend, and, if so, whether the underlying suit or proceeding as to which a defense is sought falls within the scope of any of the parties' contractual duty to defend. . . ." (*Crawford, supra,* 44 Cal.4th. at p. 565, fn. 12.)

so, whether the underlying suit or proceeding as to which a defense is sought falls within the scope of any of the parties' contractual duty to defend." (*Ibid.*)

The question whether the underlying suit fell within the scope of MBI's contractual duty to defend was a question of law that the court should have resolved against MBI in this case. MBI contends that the plaintiffs never identified it or any work done by it as a cause of the accident. The Supreme Court has reiterated that such particularity in pleading is not required where the duty to defend is at issue: "As we stated in *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 276-277, we do not, in analyzing the insurer's duty to defend, look merely to the language of the complaint filed against the insured. '*Defendant cannot construct a formal fortress of the third party's pleadings and retreat behind its walls*. . . . Since modern procedural rules focus on the facts of a case rather than the theory of recovery in the complaint, the duty to defend should be fixed by the facts which the insurer learns from the complaint, the insured, or other sources. *An insurer, therefore, bears a duly to defend its insured whenever it ascertains facts which give rise to the potential of liability* under the policy.' ([Second] italics added.) (See also *Davidson v. Welch* (1969) 270 Cal.App.2d 220, 233-234.)" (*Paramount Properties Co. v. Transamerica Title Ins. Co.* (1970) 1 Cal.3d 562, 570-571(*Paramount Properties*), first italics added; accord, e.g., *Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710,722-723.)

Most cases expressing this rule occur in the insurance context. However, the Supreme Court's citation in *Paramount Properties* of the noninsurance indemnity case of *Davidson v. Welch* for the proposition that it is the "potential of liability" under the agreement that determines whether the underlying action gives rise to a duty to defend, indicates that the court also will look beyond the literal wording of the complaint to determine whether a duty to defend is owed in noninsurance contexts. In *Davidson v. Welch*, *supra*, 270 Cal.App.2d 220, an employer-lessee of a garage was held entitled to indemnification from an employee-lessor of the garage for damages granted a customer for an assault by the employee on a customer of the garage. With respect to the duty to defend, the indemnitor argued that the complaint's allegation of an intentional or willful

tortuous act by the employee barred indemnification for public policy reasons. (*Id.* at p. 235.) However, the court found the allegations of the complaint contained the potential of liability for unintentional conduct, and so the indemnitor was required to defend. (*Ibid*.) The court stated: "*Gray* [*v. Zurich Ins. Co.*, *supra,* 65 Cal.2d at pages 275-277,] makes it clear that the bare allegations of the claimant's complaint do not control. If the broad charge made . . . contains within it the potentiality of a judgment . . . , the indemnitor becomes liable to defend. [Citation.]" (*Davidson v. Welch*, at p. 234.)

The recent case *UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10 (*UDC-Universal Development*), confirms this reasoning. There, the court applied *Crawford*, *supra*, 44 Cal.4th 541, retroactively in a case where the jury on the cross-complaint for indemnity found the indemnitor-subcontractor (CH2M Hill) had not been negligent and had not breached its contract with the indemnitee-developer (UDC).[13] (*UDC-Universal Development, supra,* 181 Cal.App.4th at pp. 13-14, 17, 24.) CH2M Hill argued that the duty to defend provision did not come into play absent a finding that it had been negligent and also argued that the negligence allegations in the underlying complaint did not target or implicate it. (*Id.* at p. 15.) The Court of Appeal held the subcontractor had a duty to defend under the indemnity contract and that the imposition of such duty was not inconsistent with the jury verdict finding the subcontractor not negligent. (*UDC-Universal Development, supra,* 181 Cal.App.4th at pp. 19-21.) The court rejected the argument that, in order for a duty to defend to arise, there had to be at least an *allegation* by the plaintiff homeowner association (HOA) that its damages arose at least partially from negligence on the part of CH2M Hill, stating, "[a]n indemnitee should not have to rely on the plaintiff to name a particular subcontractor or consultant in order to obtain a promised defense by the one the

[13] "The parties [had] stipulated that the jury would determine the factual issues of negligence and breach of contract, followed by the trial court's application of the indemnity provisions in the parties' contract in light of *Crawford.*" (*UDC-Universal Development, supra,* 181 Cal.App.4th at p. 15.)

indemnitee believes is responsible for the plaintiff's damages." (*Id.* at pp. 19, 21.) "The 'negligent act or omission' language limited CH2M Hill's *indemnity* liability to the scenario in which CH2M Hill was proven negligent. The duty to defend, however, arose when the cross-complaint attributed responsibility for the HOA's damages to CH2M Hill's deficient performance of its role in the project. Although the HOA complaint did not specifically identify each subcontractor or the details of each role in the project, its general description of the defects in the project implicated CH2M Hill's work. This was sufficient to trigger CH2M Hill's duty to defend." (*Id.* at p. 21.)

Here, we are convinced that the underlying complaints against DeSilva Gates alleging the cable median barrier was an "insufficient median barrier . . . in a state of disrepair, in need of replacement and not properly maintained, resulting in irregular elevation which further reduced arrest potential of the cable barrier," and allegations that "poor maintenance of the aging cable-barrier system" diminished or eliminated the barrier system's arrest potential, gave rise to the "*potential of liability*" of MBI. (See *Davidson v. Welch, supra,* 270 Cal.App.2d at p. 235, italics added.) This can be even more clearly seen in the additional allegations of the *Festejo* plaintiffs' complaint: that DeSilva Gates was performing construction at the location where the accident occurred; that DeSilva Gates was negligent in its maintenance of the construction zone, *including the cable barrier medians*; that DeSilva Gates was also negligent in the construction of the work being performed at and around the accident scene; and that DeSilva Gates's negligence was a substantial factor in the accident.

MBI's contentions that the plaintiffs did not specifically identify its work on the cable median barriers as contributing to the accidents, and that the allegations concerning DeSilva Gates and the cable median barrier were limited to the location of the accidents or to the construction zone, reads the complaints too narrowly, contrary to the teachings of *Gray v. Zurich Insurance Co., supra,* 65 Cal.2d 263, 276-277, *Paramount Properties, supra,* 1 Cal.3d 562, *UDC-Universal Development, supra,* 181 Cal.App.4th 10, and *Davidson v. Welch, supra,* 270 Cal.App.2d 220. DeSilva Gates had subcontracted all work related to the cable barrier system to MBI, and allegations of DeSilva Gates's

negligence and poor maintenance of the cable barrier system implicated MBI's work. The highway project encompassed the location of the accidents and extended to the area where MBI performed its operations under the contract. Allegations regarding the "construction zone" should be broadly read in connection with the duty to defend, as should allegations regarding poor maintenance of the cable median barrier at the locations of the accidents.

Both in *Crawford, supra,* 44 Cal.4th 541 and *UDC-Universal Development, supra,* 181 Cal.App.4th 10, the jury's finding that the subcontractors were not negligent (and therefore were not obligated to indemnify the indemnitees under the terms of their respective contracts) did not relieve the subcontractors from liability for their duty to defend the indemnitees in the underlying litigation. So, too, the jury's finding here that the plaintiffs' claims did not "[arise] out of or in connection with" MBI's operations under the contract (and consequently MBI was not required to indemnify DeSilva Gates for any contribution it made or losses it sustained in settlement of the underlying claims), did not relieve MBI of its duty to defend DeSilva Gates from the allegations embraced by the indemnity agreement.

II. Miscellaneous Claims of Error

DeSilva Gates's remaining claims of error must be viewed from the vantage point of our determination that the court erred in submitting the duty to defend question to the jury, but did not err in allowing the jury to determine whether the plaintiffs' claims arose from or were connected with MBI's work for purposes of indemnity. As we have observed, the court and the parties apparently conflated the issues of duty to defend and duty to indemnify and did not appear to recognize the different analyses required for resolution of the two issues. Because we have determined that MBI owed DeSilva Gates a duty to defend it as a matter of law under the provisions of the subcontract, but that the indemnity question was properly submitted to the jury, we address DeSilva Gates's remaining contentions only as they relate to the question of MBI's duty to indemnify DeSilva Gates for losses suffered by it in settling the underlying lawsuits.

As a threshold matter, substantial evidence supports the jury's determination that the underlying claims did not actually "arise out of or in connection with the work performed by MBI." DeSilva Gates does not argue that the evidence was insufficient to support the jury verdict, but rather that the question should not have been submitted to the jury in the first place.

Motions Denied by the Court

DeSilva Gates contends that the court erred in denying its "motion for judgment on the pleadings" and its motion for JNOV, arguing that the evidence supported a verdict in its favor as a matter of law.

MBI challenges DeSilva Gates's characterization of its trial brief "request for determination as a matter of law," as a motion for judgment on the pleadings. In this request, DeSilva Gates argued that the allegations of the plaintiffs' complaints were sufficient to trigger the indemnity obligation of the subcontract. We agree with MBI that the trial brief and request submitted by DeSilva Gates was not a motion for judgment on the *pleadings*, as it relied not only upon the language of the subcontract and the pleadings, but also upon various discovery matters and declarations of its expert witness. In any event, as we determined above, the indemnity issue turned on whether the claims arose out of or in connection with MBI's work—an issue requiring some factual determinations relating to minimal causation and the connection between the plaintiffs' claims of loss and MBI's work under the contract. Consequently, the trial court did not err in denying DeSilva Gates's "request for determination as a matter of law" as to the indemnity question, even assuming the request was properly presented to the court.

Nor did the trial court err in denying DeSilva Gates's request for JNOV as to the indemnity issue. This motion was made on essentially the same grounds as DeSilva Gates's request for judgment as a matter of law. "[T]he *denial* of [JNOV] is reviewed to determine whether substantial evidence supports the jury verdict; if so, the denial will be upheld." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 8:147, pp. 8-109 to 8-110 (Eisenberg), citing *Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 554-555; *Jones & Matson v. Hall*

(2007) 155 Cal.App.4th 1596, 1607.) As we have determined that the indemnity question was properly submitted to the jury and that substantial evidence supports the jury verdict as to indemnity, we conclude the court did not err in denying the motion.

DeSilva Gates contends the court erred in denying its motion in limine No. 6 to exclude causation evidence as improper and prejudicial. DeSilva Gates refers to this motion in its opening brief and asserts that "the Trial Court's failure to grant its Motions as a matter of law was made in error, that it caused substantial confusion to the Jury, and resulted in prejudice to [DeSilva Gates]." This is the whole of its specific argument relating to denial of its motion in limine in its opening brief. DeSilva Gates has failed to cite any authority for its assertion of this particular error, but instead appears to rely on its general contention that the indemnity issue was a matter of law.[14] DeSilva Gates has thus waived any claim of error posited on the court's rejection of its motion in limine. (Eisenberg, *supra,* at ¶¶ 9:21, 9:78.2, pp. 9-6, 9-25 to 9-26.) Furthermore, as DeSilva Gates apparently recognizes, the court did not *deny* that motion, but *reserved* its decision.[15] DeSilva Gates points to no place in the record where the court denies its motion and as it fails to show it obtained a ruling on its motion, this issue may not be raised on appeal. (Eisenberg, *supra,* at ¶ 8:270.10, p. 8-173.) (In any event, as the question whether the underlying claims arose from or were connected with MBI's work under the subcontract is a question of "causation"—albeit only requiring a minimal "but for" connection—were we to consider the question, we would conclude the court did not err in allowing the parties to introduce evidence relating to causation on the indemnity issue.)

[14] In its reply brief, DeSilva Gates also maintains the denial of its motion in limine was erroneous and prejudicial and states that as the question was one of law, the typical abuse of discretion standard does not apply.

[15] The court expressly reserved decision on this motion in limine: "The bottom line is I'm not going to rule on this motion in limine until we get into the reality of the trial so I can see the context in which it comes up. . . ." Asked by the clerk whether the decision on motion in limine No. 6 was reserved, the court responded, "Reserved."

Jury Instructions and Special Verdict Form

DeSilva Gates argues that the jury instructions and special verdict form submitted to the jury were incomplete and misleading, and that they improperly deferred the interpretation of the contract to the jury. With respect to the indemnity issue, we disagree.

The court instructed the jury in relevant part as follows:

"Under the provisions of section 15 of the subcontract agreement between plaintiff DeSilva Gates and [d]efendant MBI (Exhibit 48), MBI is required to indemnify and save harmless DeSilva Gates from the claims of the plaintiffs in the settled cases if those claims arose out of or in connection with MBI's operations performed under the subcontract. In assessing the possible liability of MBI to DeSilva Gates in this case, you must determine if the claims of the plaintiffs in the settled cases arose out of or in connection with MBI's work under the subcontract. If you find that the claims arose out of or in connection with MBI's work you must find in favor of DeSilva Gates and against MBI. If, on the other hand, you find that the claims of the plaintiffs in the settled cases did not arise out of or in connection with the work of MBI, you must find in favor of MBI and against DeSilva Gates."

The special verdict form asked: "1. Did the underlying claims of the plaintiffs arise out of or in connection with the work performed by MBI?" The jury answered "no" to that question and therefore did not address the second question: "What was the amount of DeSilva Gates'[s] damages, if any, arising out of or in connection with the work performed by MBI?"

"A party is entitled, upon request, to correct, nonargumentative instructions on every theory of recovery or defense that was advanced by the party and supported by substantial evidence. [Citations.]" (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2009) ¶ 9:471, citing, *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572, among others.) DeSilva Gates contends that the jury instruction and special verdict form interposed an erroneous fault or negligence determination upon the jury and disregarded and failed to address the "potential liability" component of the indemnity

agreement. We have previously concluded that the "potential liability" question was key to the issue of MBI's duty to defend, which we have resolved in DeSilva Gates's favor. It was not, however, the issue determinative of the basic indemnity question, apart from the duty to defend. Nor do we agree the instruction, as given, interposed a "fault" requirement.

" ' " 'In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion.' [Citations.]" (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 950-951.)' " (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130-1131 (*Metcalf*).) The instruction here was phrased in terms of the relevant provision of the contract. It was a correct statement of the substance of the law applicable to the indemnity issue presented.

DeSilva Gates asserts, nevertheless, that the instruction as given was too general in that the term "arising out of" was not properly defined, and as a result the instruction was incomplete and misleading. Although DeSilva Gates objected to the instruction, it failed to provide the court with a well-tailored, nonargumentative alternative. " 'Where, as here, "the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request *the additional or qualifying instruction in order to have the error reviewed*." [Citations.]' (*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520.)" (*Metcalf, supra,* 42 Cal.4th at p. 1131.)

DeSilva Gates maintains that it *did* seek instructions as to whether MBI's work subjected DeSilva Gates to liability. The "instructions" to which DeSilva Gates refers were not instructions as such, but were incorporated into several special verdict forms it proposed. The first was included in its trial brief wherein DeSilva Gates requested the court *instruct* the jury as follows:

"1) . . . MBI claims that the contract with [DeSilva Gates] provides that MBI was not required to indemnify [DeSilva Gates] unless its work on the project, in some manner, created a 'potential of a judgment' against [DeSilva Gates].

"2) After hearing the evidence relating to (1) Plaintiffs' allegations in the underlying litigation, (2) MBI's obligations under the contract, and (3) MBI's actual work on the project, do you find that MBI's work on the project had ***any part*** in creating a 'potential of a judgment' to which [DeSilva Gates] would be liable to Plaintiffs?"

These "instructions" appear not to be instructions, but, as we have observed, were part of an argumentative special verdict form. Moreover, to the extent they require a "potential of a judgment," they address the duty to defend issue rather than whether MBI had the duty to indemnify DeSilva Gates for amounts paid in settling the actions. Hence, they are not correct as to that issue. The court did not err in refusing these hybrid "instructions" on the indemnity issue.

At some point, DeSilva Gates also submitted another special verdict form set forth in full in the margin.[16] That special verdict form quoted at length from the contract. DeSilva Gates does not explain what became of that proposed special verdict form and it appears to us to be both argumentative and potentially confusing in its unnecessary and lengthy excerpts from the contract.

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[16] "On May 16, 2002, [DeSilva Gates] subcontracted with [MBI]. That contract required MBI to indemnify [DeSilva Gates] from 'all claims, demands, causes of action, damages, costs, expenses, losses or liability in law or in equity, of every kind and nature whatsoever ('Claims') arising out of or in connection with [MBI's] operations to be performed under this Agreement, including but not limited to (a) personal injury . . . caused or alleged to be caused in whole or in part by any negligent act or omission of [MBI] . . . regardless of whether such personal injury or damages is caused by a party indemnified hereunder . . . .' [¶] Do you find the *Schlicker* and *Silveira* lawsuits and the discovery obtained during the course of those lawsuits equate to a 'claim, demand, cause of action, etc' arising out of or in connection with MBI's work on the cable system.

"___ If so, you must rule in favor of DeSilva Gates;
"___ If not, you must rule in favor [of] MBI.

"Do you find that the *Festejo* lawsuit and the discovery obtained during the course of that lawsuit equate to a 'claim, demand, cause of action, etc' arising out of or in connection with MBI's work on the cable system.

"___ If so, you must rule in favor of DeSilva Gates;
"___ If not, you must rule in favor [of] MBI."

On May 6, 2008, the court addressed the special verdict form submitted by DeSilva Gates earlier that morning.[17] The court observed the special verdict form was argumentative in that it said that under the contract MBI was required to indemnify DeSilva Gates and it also appeared to be another attempt to combine an instruction and a verdict form "and that doesn't work." Counsel for DeSilva Gates acknowledged that she had "incorporated the instruction I'm proposing in the special verdict form." The court further found the special verdict form "becomes argumentative to a certain extent" and that it appeared to recite evidence. The court refused to repeat the terms of the contract in the instruction, explaining that the contract would be with the jury and "[they] can read it." Counsel for DeSilva then orally proposed that the instruction read: "If you find that the claims arose out of or in connection with MBI's work or that MBI's work contributed to DeSilva Gates'[s] *liability* to plaintiffs in the underlying actions, you must find in favor of DeSilva Gates and against MBI." (Italics added.) As counsel for MBI pointed out, the reference to liability was improper and confusing as the jury had heard that the

[17] DeSilva Gates is less than clear in its brief as to which special verdict form the court was reviewing, as it filed special verdict forms on May 5 and on May 6, 2008. It appears that the latter May 6 special verdict form is the one counsel said she had filed that morning and that it is the one discussed by the court. That proposed special verdict provided in relevant part:

"Under the contract, [MBI] was required to indemnify [DeSilva Gates] from 'any and all claims, demands, causes of action, damages, costs, expenses, losses or liability, in law or in equity, of every kind and nature whatsoever ('Claims') arising out of or in connection with its operations to be performed under the contract.

"1. Do you find that plaintiffs' lawsuits amount to a 'claim, demand, cause of action, damage, cost, expense, loss or liability' of 'any kind whatsoever' 'arising out of or in connection with MBI's performance of its work which resulted in any part to DeSilva Gates being sued by plaintiffs? [¶] . . . [¶] If you answered 'No', proceed on to question No. 2.

"2. Do you find that MBI's work on the project contributed in any part to DeSilva Gates being sued by plaintiffs in the lawsuits alleged by plaintiffs? [¶] . . . [¶] If you answered 'No', proceed on to question No. 3.

"3. Do you find that plaintiffs' claims relating to the condition of the cable barrier were connected in any part to MBI's work on the project? [¶] . . . [¶]"

underlying actions had settled and no one was found "liable." The court determined the instruction was argumentative.

" ' "A trial court has no duty to modify or edit an instruction offered by either side in a civil case," and "[i]f the instruction is incomplete or erroneous the trial judge may . . . properly refuse it." [Citations.]' [Citation.]" (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 654.) DeSilva Gates has failed to show that it submitted an accurate and nonargumentative instruction clarifying or supplementing the accurate and appropriate instruction given by the court. Consequently, it has failed to show the court erred in instructing the jury on the indemnity issue.

The court had a similar problem with the special verdict form submitted by DeSilva Gates. The court stated that the special verdict form was "not there to restate the causes of action, it's simply to ask questions and have the jury decide those questions . . . ." Counsel for DeSilva Gates then sought to have the court consider the special verdict form it had submitted the previous day.[18] The court disagreed with counsel's claim that that special verdict form was not argumentative and indicated it preferred the more "succinct" instruction it ultimately gave as "it doesn't make it all confusing." We agree that the verdict forms submitted by DeSilva Gates were argumentative, somewhat confusing, and at best redundant of the central question—whether "the underlying claims of the plaintiffs arose out of or were connected with the work performed by MBI." The court did not err in refusing these instructions.

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[18] That proposed special verdict form submitted the previous day, on May 5, 2008, provided in relevant part:

"1. Do you find that [MBI's] work on the project subjected [DeSilva Gates] to liability in the lawsuits alleged by plaintiffs? [¶] . . . [¶] If you answered 'No', proceed on to question No. 2.

"2. Do you find that MBI's work on the project contributed in any part to DeSilva Gates being sued by plaintiffs in the lawsuits alleged by plaintiffs? [¶] . . . [¶] If you answered 'No', proceed on to question No. 3.

"3. Do you find that plaintiffs' claims relating to the condition of the cable barrier were connected in any part to MBI's work on the project? [¶] . . .[¶]"

Having found no error, we need not consider DeSilva Gates's claim that the jury was confused by the instruction given and by the special verdict form.

Were we to conclude the instructions given were incomplete or erroneous, or that the court erred in refusing the special verdict forms/instructions, DeSilva Gates has utterly failed to establish it was prejudiced thereby. "In assessing prejudice from an erroneous instruction, we consider, insofar as relevant, '(1) the degree of conflict in the evidence on critical issues [citations]; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury's verdict [citation]; and (5) the effect of other instructions in remedying the error [citations].' [Citations.]" (*Soule v. General Motors Corp., supra,* 8 Cal.4th at pp. 570-571.) "Reversal for instructional error is warranted only where the reviewing court concludes ' "the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)' [Citations.]" (*Whiteley v. Philip Morris Inc., supra,* 117 Cal.App.4th at p. 656, quoting *Soule v. General Motors Corp.*, at p. 580.) DeSilva Gates does not attempt to establish prejudice using the foregoing factors. Rather, DeSilva Gates relies upon the declaration of a single juror and emails among other jurors to each other following trial to show the jury was confused and misunderstood its task. It relies upon a declaration from Juror "D.P.," presented to the trial court in connection with the new trial motion, in which she states that she and other jurors had concluded neither DeSilva Gates nor MBI were "at fault for the cross median accidents alleged by Plaintiffs"; that "the drivers' excessive speed caused the cross-median accidents"; and that the jurors' "task was to determine if MBI was at fault for or caused the cross-median accidents alleged in Plaintiffs' complaints." This declaration was clearly inadmissible to impeach the jury's verdict, as were the copies of juror emails.

Evidence Code section 1150, subdivision (a), provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. *No evidence is*

admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." It is well established pursuant to this section that "[a] juror may not describe his or her subjective reasoning process in attempting to impeach his or her own verdict; such subjective mental processes are beyond hindsight probing, and evidence about a jury's subjective collective mental process purporting to show how the verdict was reached is inadmissible to impeach a jury verdict. Thus, juror declarations are inadmissible where they at most suggest deliberative error in the jury's collective mental processes—confusion, misunderstanding, and misinterpretation of the law." (47 Cal. Jur. 3d (Mar. 2010) New Trial § 97, fns. omitted.) As recognized by our Supreme Court, "[i]n cases of a 'deliberative error' which appears to produce a mistaken or erroneous verdict, the result has almost invariably been to bar impeachment of the verdict." (*People v. Romero* (1982) 31 Cal.3d 685, 694; accord, *Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 333-335 [evidence of juror confusion and misunderstanding of relevant law was not admissible to impeach verdict]; *Locksley v. Ungureanu* (1986) 178 Cal.App.3d 457, 461 [a juror's statement as to the basis for the juror's decision, offered in support of a new trial motion, was impermissible].)

We conclude the court did not err in instructing the jury as to the indemnity issue or in utilizing the special verdict form and, in any event, DeSilva Gates has failed to demonstrate any error resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13.)

CONCLUSION

We have concluded that the trial court did not err in submitting to the jury the question whether the plaintiffs' claims "arose out of or in connection with" MBI's work under the subcontract, insofar as the indemnity issue is concerned. We have further concluded, however, that the court erred in submitting the "arising out of" question to the jury as to MBI's duty to defend under the contract. Plaintiffs' allegations relating to the cable median barrier gave rise to the potential of liability of MBI and triggered the duty to defend as a matter of law.

DISPOSITION

The judgment in favor of MBI is reversed insofar as it concludes MBI had no duty to defend DeSilva Gates in the underlying action. Insofar as the judgment concludes MBI had no duty to indemnify DeSilva Gates, we affirm. The matter is remanded for further proceedings, consistent with this opinion, including the award of attorney fees and costs reasonably incurred by DeSilva Gates in enforcing MBI's duty to defend under the subcontract. In all other respects, the judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Richman, J.